No. 788.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SAMUEL BROS. AND COMPANY,
a corporation,
Appellant,

vs.

THE HOSTETTER COMPANY,
a corporation,
Appellee.

Petition for Rehearing.

R. H. COUNTRYMAN,
Solicitor for Appellant.

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PETITION FOR RE-HEARING.

The appellant earnestly requests a hearing herein.

The appellant herein is engaged in transacting a large business. It has a large capital invested, and has offices in San Francisco, and in the city of New York.

Looking through its corporate entity to ascertain the personality behind, we find men of the highest business standing in San Francisco. We challenge criticism as to the standing of any member of the corporation. The president of appellant, Mr. Moses Samuel, has for many

years occupied a position of trust and responsibility with one of the large Hebrew congregations of San Francisco, and his name as a business man and philanthropist stood without blemish until the decree of the Honorable Circuit Court.

This cause was tried with a number of others, in none of which was any appeal taken, and feeling that the distinguished Circuit Judge had reached an erroneous conclusion by reason of the association from the consolidation of the causes, the appellant took the only course open to it, that of appealing to this Honorable Court.

Pending the appeal, the appellee tended offers of settlement, which the appellant refused, stating that it was not a matter of money, but something which was higher than money, good reputation, and that, therefore, any mere waiving of financial responsibility was not of consideration to appellant. That such is true, is proven by the expense undergone by appellant, appearing as it does from the record that the amount of bitters appellant sold was about ($70.00) seventy dollars per year, invoice price (p. 225).

One of the difficulties in equity cases with which we all have to labor is the failure of the Court to see the witnesses, and observe their manner of testifying. Certainly, if the Court could have observed the two witnesses Morrison and McEwers, it would have agreed with the opinion of Judge Baldwin, in which Judge Field concurred, in *Blankman* vs. *Vallejo*, 15 Cal. 645, that the credulity of a Court does not necessarily correspond with the vigor and positiveness with which a

witness swears, and that the Court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements.

It is difficult to photograph the scene of the taking of the deposition of the witness in an equity case. We call the Court's attention to pages 146–154 of the testimony relative to the notes, claimed to have been made by the two witnesses, of the interview between them and the salesman of appellant. It should be remembered that these witnesses had testified in a number of other cases, that there was a remarkable similarity of alleged statements made by salesman to them, and that they were carefully coached through the taking of the testimony. In this particular case, the writer happening to go from the room when Mr. Morrison was testifying found Mr. McEwers in a space partitioned off, carefully listening to the testimony of Morrison, with such evident purpose that comment is superfluous. The testimony was taken in the Parrott Building, over what is known as the "Emporium", in San Francisco.

With reference to these particular notes, after strenuous objection being made to their production by appellee's solicitor, and finally after said solicitor *reminded* the witness that he had the right to see the notes, and from such *reminder* the witness obtained their possession, that before the witness could be asked another question, said solicitor changed his position, and informed the witness that if he so desired he could answer without examining his notes (p. 148).

The subsequent questions and answers and colloquy in the record show beyond controversy that the witness had examined the portion of the notes about which he was being cross examined, that he had removed the first page of the notes so as to see what was contained on the second page, which contents were the subject of his cross examination, and that everybody present in the room were advised and knew that the witness had examined the said notes. It is always unpleasant for a lawyer to criticize his opponent, and particularly so when the criticising lawyer is on the losing side of the litigation. However, we invite the attention of the Court to the record which somewhat obscurely photographs the scene.

Again consider the taking of the depositions, conceding all that has been said in the opinion of the learned Circuit Judge, who was the author of the opinion, the Court has overlooked the fact that the statements contained in the certificate are untrue. The depositions were not only taken in this case, but taken in other cases at the same instant of time, a charge was made against each of the defendants, based upon the theory that the deposition was taken in a regular way in each case, yet an examination of the depositions show that they were purely carbon copies and there is no testimony for the inference drawn in the opinion that the witness had read over his deposition taken on a former occasion, and that such deposition was for convenience used in this particular instance, rather than depositions given in some of the other litigation pending in other jurisdictions.

Consider again the foundation of appellee's alleged title. It does not favorably strike the moral sense for the administrator of an estate to sell to a corporation, of which he is president, he acting as the representative of the buyer and seller, and thus obtain property, which is claimed to be worth millions by a payment of NINE THOUSAND ($9000.00) DOLLARS in cash and an agreement to pay the further sum of EIGHTY ONE THOUSAND ($81,000.00) DOLLARS on demand (pages 543, 544 and 545).

Again the appellee is defrauding the U. S. government out of large revenues by selling an alcoholic stimulant as a medicine.

The Court assumes that the allegation of our answer, that we could neither admit nor deny the allegations of the bill of complaint relative to the corporate existence of the appellee, is subject to criticism.

All the precedents are in favor of the form of denial made by us, and reason and the history of Courts of Equity would seem to warrant the form we used.

We had no way of ascertaining the corporate existence of the appellee and to have denied it flatly would have shown a willingness to make statements without due knowledge, which we think is not commendable, and we therefore adopted the precedent laid down by every writer on equity pleading and procedure, which has come under our observation.

We did not follow the code form of denial, but adopted the form used in Courts of Equity from past ages. The purpose of purging the conscience of the defendant is manifest in equity pleadings, but not to

compel the admission of an allegation without the knowledge or information of the defendant, or to make a positive denial of an allegation that might be true.

We have somewhat lengthfully considered the case in our briefs, and we do not consider it necessary to take up the various propositions therein discussed in a petition for re-hearing, believing as we do, that the Court will as carefully consider those positions as though they were re-stated in this petition.

It may be difficult for the Court to place itself in our position but it is certainly disheartening to a lawyer to maintain the high standing and morality of his profession, when he sees crude, clumsy perversions of fact successful before a tribunal of such high character and recognized ability as a United States Circuit Court of Appeals.

We hear that it is easy to simulate suits in equity for the purposes of obtaining decisions to be used in another jurisdiction and that such things are done, or attempted to be done, even in patent cases, where the witnesses are present before the Judge in open Court, but it is hard to believe that experienced jurists are so easily deceived, and yet when a litigant of high respectability, who has conducted himself according to ideal planes of fair dealing and business morality, finds his reputation sworn away in a loose manner by irresponsible persons, paid for the purpose of obtaining testimony, he feels that a good reputation and a high character are of but little substantial value.

Respectfully submitted,

R. H. COUNTRYMAN,
Solicitor for Appellant.

I hereby certify that the foregoing petition for rehearing is in my opinion well founded in point of law and that it is not interposed for delay.

R. H. COUNTRYMAN,
Solicitor for Appellant.